

**TESTIMONY OF RONNIE LUPE, TRIBAL CHAIRMAN  
OF THE WHITE MOUNTAIN APACHE TRIBE  
FORT APACHE INDIAN RESERVATION, ARIZONA  
SENATE COMMITTEE ON INDIAN AFFAIRS**

S. 2959 -To amend the White Mountain Apache Tribe Water Rights Quantification Act of 2010 to clarify the use of amounts in the WMAT Settlement Fund.

**June 29, 2016**

**Chairman Barrasso, Vice Chairman Tester, Senator McCain and members of the Committee:** Thank you for the opportunity to testify in support of S. 2959 - A Bill to amend the White Mountain Apache Tribe Water Rights Quantification Act of 2010 to clarify the use of amounts in the WMAT Settlement Fund.

My name is Ronnie Lupe, and I am the Tribal Chairman of the White Mountain Apache Tribe. We live on the Fort Apache Indian Reservation upon aboriginal lands which we have occupied since time immemorial. Our Reservation is located about 200 miles Northeast of Phoenix in the White Mountain Region of East Central Arizona.

The Tribe's current water sources and infrastructure have been and continue to be grossly inadequate to meet the current demands and needs of our reservation communities. Fortunately, subsequent to our agreeing to a quantification of our aboriginal and federally reserved water rights in 2009 with various state parties following decades of litigation, Congress enacted the White Mountain Apache Tribe Water Rights Quantification Act<sup>1</sup> ("Quantification Act")(P.L. 111-291). The cornerstone of that Act, which confirmed the 2009 Water Rights Quantification Agreement and Settlement, is the authorization for the design and construction of the White Mountain Apache Tribe Rural Water System (the "Rural Water System")(P.L. 111-291), which will bring desperately needed safe and reliable drinking water to our Tribe and its members.

S. 2959 will clarify the intent of a provision in the Act concerning the Rural Water System and enable us to shift some amounts of already authorized spending among authorized activities. Specifically, the legislation would clarify Congress's intent to allow the Tribe to use the existing authority under Section 312(b)(2) of the Act for "water-related economic development" projects to complete the construction of the Rural Water System.

If this issue is not resolved, the completion of the Rural Water System project will be threatened, thereby increasing the ultimate cost to the United States and delaying the delivery of life-sustaining drinking water to our reservation communities.

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<sup>1</sup> The White Mountain Apache Tribe Water Rights Quantification Act became Title III of the Claims Resolution Act of 2010 (the "Act"). P.L. 111-291.

## **Fort Apache Indian Reservation and the Tribe's Reserved Water Rights**

The Tribe holds full beneficial title to 1.66 million acres of trust land in the east central highlands of the State of Arizona. The Tribe's Fort Apache Indian Reservation was established by Executive Order in 1871. We have retained actual, exclusive, use and occupancy of our aboriginal lands within the boundaries we agreed to and later designated by the Executive Orders dated November 9, 1871 and December 14, 1872, without exception, reservation, or limitation since time immemorial. The Tribe's vested property rights, including its aboriginal and other federal reserved rights to the use of water, often referred to as Winters Doctrine Water Rights, that underlie, border and traverse our lands, have never been extinguished by the United States and are prior and paramount to all rights to the use of water in the Gila River drainage, of which the Salt River is a major source.

Except for a small portion of the Reservation that drains to the Little Colorado River Basin, virtually our entire Reservation drains to the Salt River. The headwaters and tributaries of the Salt River arise on our Reservation and are the principal sources of water for the Tribe, and the greater metropolitan Phoenix area. Specifically, 78 percent of the water in Theodore Roosevelt Reservoir located north of the Phoenix Valley is contributed from our reservation; at Saguaro Lake reservoir, further South, 60 percent of the water is contributed from our reservation; and below the confluence of the Verde River and Salt River, near Granite Reef Dam, Scottsdale, 42 percent of the water comes from our reservation. The importance of achieving implementation of our 2009 Water Rights Quantification Agreement is essential to the well-being of the White Mountain Apache Tribe and the downstream water users in the Phoenix Valley.

## **White Mountain Apache Tribe Water Rights Quantification Act of 2010**

In 2010, this Congress approved the historic White Mountain Apache Tribe Water Rights Quantification Act as part of the Claims Resolution Act of 2010 (P.L. 111-291). The legislation was sponsored in by Senator McCain, now-retired Senator Jon Kyl, and the entire Arizona delegation in the House. Importantly, the Act was budget neutral.

The Quantification Act resolved the Tribe's water related damage and reserved water rights claims against the United States, the State of Arizona, and a number of state parties in regards to rights in the Little Colorado River and the Gila River (Salt River and Tributaries thereto). In consideration for the Tribe waiving its water related claims and prior reserved rights, the Act authorized funding for the construction of the Rural Water System comprised of a dam and reservoir, treatment plant, and a 55 miles of pipeline to serve virtually every reservation community. In addition, the Act also authorized funding for, among other things: (1) cost-overruns for the Rural Water System (Sec. 312(e)) and (2) "water-related economic development projects" as part of the WMAT Settlement Fund (Sec. 312(b)).

The White Mountain Apache Tribe Water Rights Quantification Agreement, which was respectfully negotiated amongst all parties, was formally approved by the White Mountain Apache Tribe and all parties, including the Secretary of the Interior, and subsequently approved by the Superior Courts (Apache County and Maricopa County Superior Court) of the State of Arizona on December 18, 2014. The White Mountain Apache Tribe Water Rights Quantification

Settlement Judgment and Decree was filed in Maricopa County and Apache County on March 15, 2015. The Judgments and Decrees become enforceable on the date that the White Mountain Apache Tribe Water Rights Quantification Act becomes enforceable with the publication by the Secretary of the Record of Decision allowing the construction of the Rural Water System project to go forward.

### **The Tribe's Drinking Water Crisis**

The driving force behind the 2009 water rights settlement and the 2010 Quantification Act was the long-standing need to provide a reliable and safe water supply and delivery system to the members of the White Mountain Apache Tribe. The Tribe and Reservation residents are in urgent need of a long-term solution for their drinking water needs. Currently, the Tribe is served by the Miner Flat Well Field. Well production has fallen sharply and is in irreversible decline. Over the last decade, well production has fallen by 50%. A small diversion Project on the North Fork of the White River was constructed several years ago to compensate for the precipitous loss of well production, but was only a temporary fix and drinking water shortages remain a chronic problem. The Tribe experiences annual summer drinking water shortages, and there is no prospect for groundwater recovery as there is little or no groundwater on the reservation. The quality of the existing water sources threatens the health of our membership and other Reservation residents, including the Indian Health Service Regional Hospital and State and Bureau of Indian Affairs schools. The only viable solution is the replacement of failing groundwater resources with surface water from the North Fork of the White River.

Without reservoir storage behind Miner Flat Dam, a feature authorized by the Act, the stream flows of the North Fork of the White River, supplemented by short-term capacity of the Miner Flat Well Field, are together inadequate to meet current, much less future, community demands of the White Mountain Apache Tribe in the Greater Whiteriver Area, Cedar Creek, Carrizo, and Cibecue and to maintain a minimum flow in the North Fork of the White River. The demands of the Tribe for its Rural Water System will literally dry up the North Fork of the White River before 2020, even in combination with a supplemental supply from the Miner Flat Well Field. Therefore, Miner Flat Dam is necessary to store 6,000 acre feet of water during runoff periods for release and enhancement of the North Fork of the White River to not only meet demands of the Reservation Rural Water System but to maintain a minimum flow required for aquatic and riparian habitat preservation and enhancement.

In sum, the Rural Water System will replace the failing and terminal groundwater well system and enable the Tribe to construct a secure, safe and reliable drinking water supply for the current 15,000 White Mountain Apache Tribal members and residents living on our Reservation and to meet the increasing drinking water needs of the Reservation for a future population of nearly 40,000 persons in the decades to come.

### **Need for Technical Clarification**

After passage of the Act, the Tribe continued, with a loan from Reclamation, with work on the design and geotechnical work for the proposed dam site of the Rural Water System. In the course

of this work, the Tribe's consulting engineers discovered potential seepage and stability conditions in the foundation material at the dam site than had not been previously known. The cost-overrun funding necessary to address these design and construction issues will in no event be greater than the total amounts authorized in Sections 312(a), (b), and (e), of the Act which respectively authorized the Rural Water System, the WMAT Settlement Fund, and cost-overruns for the System.

The WMAT Settlement Fund authorized in Section 312(b)(2) of the legislation was written sufficiently broad to authorize the use of the fund for cost-overruns. Consistent with the goals of self-determination and self-sufficiency, Congress intended the Tribe to have wide discretion on how to use and prioritize any of the authorized uses in Section 312(b)(2)(C), which, as noted, includes the very broad category of "water-related economic development projects." This intent that we would have wide discretion on the use of these funds has always been our understanding and we have relied on that belief. Since the Rural Water System will serve a number of water-related activities from housing to hydropower, it fits squarely within the Settlement Fund's authorized purposes. For example, the System will provide: (1) water for new and existing housing on the reservation; (2) water for existing irrigation; (3) the ability to expand irrigation (approximately 2,000 acres); (4) improvements to the Alchessay fish hatchery; (5) lake-based recreation for fishing and non-motorized boats; and (6) the potential for small-scale hydro-electric (approximately two megawatts). Given the importance of the Rural Water System and its economic development purposes, the Tribe is willing to use this existing authorization to complete the Rural Water System in lieu of other development alternatives listed in Section 312(b).

Recognizing that the Rural Water System was the cornerstone of the Act, Congress provided sufficient flexibility in its funding authorization to ensure that funding for the Rural Water System could be accessed from various authorizations, including Sections 312(a), (b), and (e). The Secretary is only authorized to require changes to the design of the Rural Water System if it cannot be constructed "for the amounts made available under Section 312." Sec. 307(c)(2)(B)(iii). Section 307 does not limit how funds within Section 312 can be used, nor was it intended to.

Notwithstanding the language of the Act, the Department of the Interior has indicated that it is not absolutely clear (from its perspective) whether the Settlement Fund can be used for the System's cost overruns. Consequently, a technical amendment is necessary to clarify that authorization authority exists in Section 312(b) for any necessary cost-overruns associated with the WMAT Rural Water System.

The importance of our water rights settlement and the WMAT Rural Water System to the health and welfare of our people cannot be overstated. We must ensure its timely design and completion by resolving the cost issue within the Act's existing authorization now, not later. This legislation would clarify that we have the necessary authorization to complete the project. If it is not resolved, the completion of the project will be threatened, thereby increasing the ultimate cost to the United States and delaying the delivery of life-sustaining drinking water to our reservation communities.

Chairman Ronnie Lupe